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IN THE

Supreme Court of the United States

October Term, 1967

No. 1191

AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD AND CRAWFORD MANUFACTURING CO., INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Amalgamated Clothing Workers of America, AFL-CIO (referred to herein as the "Amalgamated" or the "Union"), Intervenor in the proceedings below, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case. The Solicitor General filed a petition for certiorari in this case on behalf of the National Labor Relations Board on January 25, 1968.

Opinions Below

The opinion of the court of appeals, not yet officially reported, is contained in 66 LRRM 2529. The decision and order of the National Labor Relations Board is re-

ported at 161 NLRB No. 91 (1966). The court's opinion is contained in the Board's petition, App. A (pp. 15-33) and the Board's Decision and Order is contained in the Board's petition App. C (pp. 36-135) and at J.A. 11-111.[1] The opinion of the court below denying the Amalgamated's motion for rehearing is not contained in the Board's petition and is attached to the Amalgamated's petition as Appendix E.

Jurisdiction

The judgment of the court of appeals was entered October 27, 1967 (Board petition App. B, pp. 34-35.). The Amalgamated filed a motion for rehearing November 24, 1967, which motion was denied by the court of appeals December 6, 1967 (Appendix E, *infra,* pp. 15-16). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

1. Where substantial evidence supports the finding of the National Labor Relations Board that eight employees were laid off on account of their union activity, may the court of appeals reverse the Board because it chooses to accept the company's explanation for the lay-offs?

2. Where substantial evidence supports the findings of the National Labor Relations Board: (a) that a majority of the employees in a unit appropriate for collective bargaining signed cards which clearly authorize the union to represent them for collective bargaining purposes; (b) that none of

[1] In order to avoid duplication of the record, references to proceedings below are keyed to the National Labor Relations Board's petition for certiorari (referred to herein as "Board petition"), as well as to the Joint Appendix in the court below (referred to herein as "J.A.").

the employees establishing said majority were told that the cards would be used solely to obtain a Board representation election; and (c) that the company by other acts and conduct engaged in unfair labor practices designed to dissipate the union's majority; may the court of appeals refuse to enforce a bargaining order based on such findings because it decides that the employees were confused as to the purpose of the cards?

Statute Involved

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.) are set forth in the Board's petition, Appendix D, pp. 136-138.

Statement

A. The facts and proceedings below

This case arises out of the Amalgamated's campaign to organize the employees of Crawford Manufacturing Company (referred to herein as the "Employer" or the "Company") at the Employer's Emporia, Kansas plant. The Union's representatives solicited employees to sign authorization cards designating the Amalgamated as their collective bargaining representative by telling them in straight-forward, accurate and thorough terms the steps the Union would take to obtain bargaining rights.

Authorization cards were first distributed to employees at the plant gate on January 7, 1965 [2] by Jay Dee Patrick, a national representative of the AFL-CIO acting on behalf of the Amalgamated. The cards were attached to a leaflet bearing the prominent heading "An Invitation to Join" the "ACWA" (Board petition pp. 44-45; J.A. 117-118,

[2] All dates are 1965 unless otherwise noted.

631-634). The language of the cards, set out below,[3] specifically states that it is an application for membership, authorizes the Amalgamated to represent the signatory in negotiations concerning conditions of employment, and makes no mention of an election whatsoever. The following day, Plant Manager Jones addressed all the employees and, as if to make plain the meaning of the cards, stated that "yesterday an outside union organizer handed all of our employees an invitation to join an outside union." (Board petition p. 45; J.A. 588-589).

At the Amalgamated's first organizational meeting, on January 12, Patrick read the cards to some 75 employees. He explained that the Union would demand recognition on the basis of the signed authorization cards, but pointed out candidly that the demand would probably be rejected and that it would then be necessary to proceed to an election[4] (Board petition pp. 49-50; J.A. 121-122, 133). Patrick

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[3] The card reads as follows:

APPLICATION FOR MEMBERSHIP

in the

Amalgamated Clothing Workers of America,
AFL-CIO

1627 LOCUST ST. ST. LOUIS (3) MO.

CEntral 1-9329

I, the undersigned, hereby apply for membership in the Amalgamated Clothing Workers of America, and do hereby appoint and authorize the officers thereof, to represent and negotiate for me in all matters, pertaining to wages, hours and other conditions of employment.

Name (Please sign): .....
Address: .....
Telephone Number: ..... Date: .....
Company: .....
Department: ..... Operation: .....

[4] This two-step procedure of demand for recognition followed by petition for election is a standard organizing method fully sanctioned by the Board and approved by the courts, see e.g. *Bernel Foam Products Co.*, 146 NLRB 1277 (1964); *Irving Air Chute Co.* v. *National Labor Relations Board*, 350 F.2d 176, 182 (C.A. 2).

told the employees to take the cards home, read and think about them and discuss the matter with their families, and return the cards to the Union in the envelopes provided (Board petition p. 50; J.A. 123).[5]

By January 18 the Union had received over 100 signed authorization cards from employees in an appropriate collective bargaining unit of 172 employees (Board petition pp. 52, 104-105). The Union thereupon made its written demand for recognition in the said unit, and petitioned the Board for an election. The Employer rejected this demand on January 20, by which time the Board had received the Union's election petition (Board petition pp. 43, 53-54; J.A. 621-623).

On January 19, Patrick held a second meeting, attended by about 72 employees. Patrick informed the employees that he had sent the Company a letter requesting recognition based upon the authorization cards and read the letter to them. He also told them that he had petitioned for a Board election in the event the demand was refused which, as he had previously advised them, he anticipated. He told the employees that they were free to withdraw their authorization cards, as suggested by the Company, and offered to help anyone who so wished to get his card back (Board petition p. 58; J.A. 135-136).

During the two and a half months between the commencement of the Amalgamated's organizing drive and the election, the Board found that the Employer engaged in a course of conduct which was designed to dissipate the Amalgamated's majority and constituted unfair labor practices. It held that the Employer repeatedly threatened employees with reduced benefits if the Union won the election; warned known key Union adherents of reprisals for their Union activity; coercively interrogated employees

[5] Between 10 and 20 employees returned their cards to Patrick at that meeting (Board petition p. 52; J.A. 123, 133). The others held their cards for a longer period of time.

about their Union activities; and, violated Section 8(a)(1) of the Act in other respects (Board petition pp. 94-104, 127). The court found that the Board had substantial evidence in the record to support these findings and sustained its order directing the Employer to cease and desist from these violations of the Act (Board petition p. 18).

But when it came to the Board's findings that the Employer violated Sections 8(a)(3) and 8(a)(5) of the Act—findings that in the opinion of dissenting Judge Sobeloff call for a more stringent remedy than "an ineffectual slap on the wrist"[6]—the court balked at sustaining the Board.

The day after the Employer and the Amalgamated signed a consent election agreement the Employer laid off eight employees only to recall them almost immediately after the Union lost the election held March 26. Relying upon the timing of the layoffs, the union activity of those involved and the transparency of the Employer's proffered economic justification, the Board held that these layoffs were discriminatory and violated Section 8(a)(3) of the Act (Board petition pp. 88-91). Without even raising the question whether substantial evidence supported the Board's findings the Court reversed because it independently concluded that there was "no acceptable basis for this discredit of the company" (Board petition pp. 18-19).

The Union was defeated in the election 85 to 69, with 8 challenged ballots. In order to effectively remedy the numerous violations of the Act by the Employer, the Board set the election aside and ordered the Employer to bargain with the Amalgamated on the basis of its majority status as demonstrated by the authorization cards. This remedy was not only predicated upon the finding that the Employer's refusal to bargain with the Union was in bad faith in violation of Section 8(a)(5) of the Act, but was granted

[6] Judge Sobeloff so characterized that portion of the remedy sustained by the court (Board petition p. 25).

because the Employer's conduct made it impossible to hold a free and fair election (Board petition pp. 102-104). The court refused to enforce the Board's bargaining order because it entertained a doubt that a majority of the employees validly designated the Union to represent them. So finding, the court did not reach the question whether the Employer violated Section 8(a)(5) of the Act or whether the remedy is appropriate (Board petition pp. 19-25).

B. The Union's majority

The Board sustained the Trial Examiner's reasoning and conclusion that 101 employees in an appropriate collective bargaining unit of 172 employees validly designated the Union to represent them. The Trial Examiner gave considerable weight to the uncontroverted facts that the card itself, in plain and unambiguous language, authorizes the Amalgamated to represent the employees; that Patrick read the card to an assembly of about 75 employees; that he subsequently read to about 72 employees a letter he had sent to the Employer requesting recognition on the basis of these authorization cards; and, that, at best, only one employee attempted to revoke his bargaining authorization, despite repeated requests by the Employer that the employees do so (Board petition pp. 115-116). The court does not dispute any of these facts and indeed affirms that at the second meeting Patrick told the employees he had used their cards as the basis of his demand for recognition (Board petition pp. 19-25). The Trial Examiner concluded that Patrick gave a straightforward, clear and truthful account of the uses to which the card would be put.

The Trial Examiner found that none of the 101 cards he counted as valid were procured by a representation that the card would be used *solely* for an election;[7] he

[7] The Trial Examiner rejected 4 of the 105 proffered cards on this basis, leaving 101 cards upon which he based the Union's majority (Board petition pp. 126, 138).

discredited testimony to this effect when given in response to leading questions or where inconsistent with credited testimony. In assessing the Employer's attack on the validity of the cards the Trial Examiner noted that the employees testified almost nine months after they signed their cards and appeared not to have a clear recollection at the time of the hearing of the representations made to them previously (Board petition p. 109). He considered the Employer's pre-trial interrogations [8] to unduly suggest to employees that they testify that they had signed the cards in order to obtain an election and noted that employees testifying in front of a hostile Employer would naturally wish to minimize the effect of signing an authorization card by stating it was for some purpose other than representation (Board petition pp. 110-112). For these reasons, he viewed with reasonable skepticism testimony inconsistent with the overt act of signing a valid and unambiguous authorization card.

The court, on the other hand, by taking some of Patrick's statements out of context [9] and without considering

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[8] The questionnaire, distributed by the Company to practically every employee, is set out in the Board petition pp. 134-136 and at J.A. 558-587. The only question dealing with an election, No. 1(d), required the employee to use the word "solely" if he wished to state that representations were made to him about a Board election. It appears that after employees completed the questionnaire they were called in individually by the Company's attorney to amplify their answers. The Company's attorney then reduced their statements to writing using his own language, and had the employees sign or initial the resulting document, see *e.g.* J.A. 160-164, 191-195, 321-322.

[9] The court refers only to those representations by Patrick having to do with an election or application for membership, and completely ignores Patrick's statements that the cards would first be used to demand recognition (Board petition pp. 48-51, 116-118). Dissenting Judge Sobeloff cites the other relevant portions of the Board's Decision in footnote 3 of his dissent (Board petition pp. 26-27). With regard to Patrick's statements about joining the Union, he merely assured employees that their application for membership would not be acted upon until a contract had been successfully negotiated. (Board petition, pp. 117-118). The court's analysis is not directed at what Patrick said, but rather at the elusive subjective state of mind of the employees who signed cards.

in detail the testimony of even a single employee, rejected all 101 cards outright because it felt that employees were confused as to the purpose of the cards.

Reasons for granting the Writ

1. Conflict with decisions of the Supreme Court.

The Fourth Circuit has, in virtually all cases recently decided by it, rejected the notion that validly obtained authorization cards may create a duty to bargain with a union. If this is not apparent from the court's wholesale rejection of the authorization cards in this case, it is seen in two other recent cases in this circuit which must be read with the *Crawford* decision: 1) *National Labor Relations Board* v. *Logan Packing Co.*, No. 10,355, 66 LRRM 2596; and 2) *National Labor Relations Board* v. *Sehon Stevenson & Co.*, No. 10,189, 66 LRRM 2603, both decided October 27, 1967. While both cases could have been decided on narrow grounds (as pointed out by Judge Sobeloff in his separate opinion in *Stevenson*) the court condemned authorization cards as a predicate for demanding recognition except in "extraordinary cases." (66 LRRM at 2603.) This reasoning makes it virtually impossible for a union to obtain recognition through authorization cards unless the employer voluntarily grants such recognition, a result which is squarely in conflict with the Supreme Court's decision in *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62; cf. *International Ladies' Garment Workers Union* v. *National Labor Relations Board (Bernhard-Altmann)*, 366 U.S. 731; see also *Joy Silk Mills, Inc.* v. *National Labor Relations Board*, 185 F. 2d 732 (C.A.D.C.), certiorari denied, 341 U.S. 914.

2. Non-compliance of the court with the Supreme Court's "substantial evidence" doctrine.

In *National Labor Relations Board* v. *Walton Manufacturing Company*, 369 U.S. 404, this Court reiterated the holding of *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, in noting the Fifth Circuit's failure to apply the "substantial evidence" rule to discharge cases decided by the Board. In the instant case the Fourth Circuit has exceeded its scope of review in the same manner as that condemned in *Walton*.

In this case, there was substantial evidence in the record to support the Board's finding that eight employees were laid off because of their union activity, in violation of Section 8(a)(3) of the Act. The Board based its conclusion on the timing of the layoffs, the fact that union adherents were selected, and the failure of the Employer to support its alleged economic justification for the layoffs. In disposing of this entire issue in two short paragraphs (Board petition pp. 18-19), the court did not even consider whether substantial evidence supported the Board's conclusion. Rather, it cited the Employer's proffered economic justification and cryptically stated "we see no acceptable basis for this discredit of the company . . . we discern no falsification here".

At best, the facts give rise to two conflicting views as to the company's motivation for its conduct. But the court may not "displace the Board's choice" between these two possibilities, where the Board's conclusion is supported by substantial evidence, even though the court could have justifiably drawn a different inference if it had heard the case *de novo*. *Universal Camera, supra* at p. 488. The court below chose the Employer's explanation in spite of substantial evidence to support the Board's findings, thus ignoring this Court's instructions in *Walton* and *Universal Camera*. (*supra*)

The court's erroneous interpretation of its reviewing function also permeates its treatment of the authorization cards. Its approach should be contrasted with that of the D.C. Circuit in the recent case of *United Automobile Workers* v. *National Labor Relations Board and Preston Products, Inc.*, No. 20,137, et al., decided November 14, 1967, 66 LRRM 2548. The D.C. Circuit upheld the finding of the Trial Examiner and the Board that employees validly designated the union as their collective bargaining agent and distinguished the recent decision of the Second Circuit in *National Labor Relations Board* v. *S.E. Nichols Co.*, 380 F. 2d 438, in which the Second Circuit made an independent review of the evidence. Commenting on this, the D.C. Circuit wrote:

> "The *Nichols* rule would require us to examine all relevant testimony in detail, to adjudge the credibility of each witness, and to weigh the evidence. Yet, as noted above, the Board is 'one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge', *Universal Camera Corp.* v. *National Labor Relations Board, supra*, 340 U.S. at 488, and it would be difficult to imagine a topic more clearly within this specialized field than the evaluation of the significance of the circumstances under which authorization cards are solicited."

In this case, the Trial Examiner made numerous credibility findings, and the Board in sustaining these findings utilized its particular expertise in determining the validity of the authorization cards. In accordance with the scope of review delineated by *Universal Camera* and reiterated by the D.C. Circuit, these findings should not have been disturbed on review, when they were supported by substantial evidence.

3. Conflict among the Circuits.

The Board's bargaining order would have been sustained in the courts of appeal for at least two other circuits.

In *United Automobile Workers* v. *National Labor Relations Board and Preston Products, Inc., supra,* the D.C. Circuit upheld the Board's *Cumberland Shoe*[10] doctrine; that a clear and unambiguous authorization card may not be invalidated absent a representation to the signatory employee that the *only* purpose of the card is to secure an election. A similar view is taken by the First Circuit in *National Labor Relations Board* v. *Southbridge Metal Works, Inc.,* 380 F. 2d 851 (C.A. 1). Under the rulings of both courts a representation to an employee that the card will be used to obtain an election does not invalidate it, since such a use is consistent with the card's primary function of obtaining recognition. Both courts agree with the Board that the overt act of signing a clear authorization card is more reliable than the testimony of employees, in the presence of company officials, after the company has committed unfair labor practices. The two circuits also affirm the Board's doctrine that an employee's thoughts (or afterthoughts) as to why he signed a card cannot negate the overt act of having signed the card, *Joy Silk Mills, Inc.* v. *National Labor Relations Board,* 185 F. 2d 732, 743 (C.A.D.C.) certiorari denied 341 U.S. 914. Since the Board in the instant case found that none of the 101 cards it counted towards the Amalgamated's majority are tainted by a representation that the card would be used *only* for an election, its bargaining order would be sustained in the D.C. and First Circuits.

In contrast with the above Circuits, the Fourth Circuit makes its own review of a cold record, ignoring the Board's expertise in the realities of organizing campaigns, and

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[10] *Cumberland Shoe Corp.*, 144 NLRB 1268 (1963), enforced, 351 F. 2d 917 (C.A. 6).

determines what employees thought when they signed authorization cards. Only the Fifth Circuit, in *Engineers and Fabricators* v. *National Labor Relations Board,* 376 F. 2d 482 (C.A. 5), takes a similar view, chiding the Board for failing to probe "into the subjective intent of the challenged signers."

Recent decisions of several of the other circuits reflect a modified view of the *Cumberland Shoe* doctrine, e.g. *National Labor Relations Board* v. *S.E. Nichols Co., supra; Bryant Chucking Grinder Co.* v. *National Labor Relations Board,* No. 30844, decided December 12, 1967, 67 LRRM 2017 (C.A. 2); *National Labor Relations Board* v. *Swan Super Cleaners, Inc.,* No. 16,952, decided October 25, 1967, 66 LRRM 2385 (C.A. 6); *National Labor Relations Board* v. *Dan Howard Manufacturing Co.,* No. 16,154, decided January 11, 1968, 67 LRRM 2278 (C.A. 7); *Bauer Welding and Metal Fabricators* v. *National Labor Relations Board,* 358 F. 2d 766 (C.A. 8). The Tenth Circuit appears to continue to follow *Cumberland Shoe,* see *Furr's, Inc.* v. *National Labor Relations Board,* 381 F. 2d 562, *certiorari denied,* 389 U.S. 840. Several of the foregoing decisions explicitly point out the differences between their views and those of other circuits on the issue of authorization cards, e.g. *Bryant Chucking Grinder Co.* v. *National Labor Relations Board, supra,* 67 LRRM at 2019, 2020 (referring to C.A.D.C.; C.A. 2; and C.A. 6); *United Automobile Workers* v. *National Labor Relations Board and Preston Products, Inc., supra,* 66 LRRM at 2552 and 2555 (referring to C.A. 2 and C.A. 6); *National Labor Relations Board* v. *Swan Super Cleaners, supra,* 66 LRRM at 2392 (referring to C.A. 2); *National Labor Relations Board* v. *Dan Howard Manufacturing Co., supra,* 67 LRRM at 2280, 2281 (referring to C.A.D.C.; C.A. 2; and 6).

Thus, the conflict between the Circuit Courts is multiplying and requires a final resolution.

The Petitioner, an international union, which represents some 385,000 employees in almost every state in the United States, should not be subjected to such a variety of holdings depending upon the circuit in which jurisdiction lies to review or enforce a Board order.[11] The vital question whether employees can secure the representation rights guaranteed them under the Act and whether the Board can fashion remedies adequate to correct violations of the Act should not be left to jurisdictional happenstance. This Court should harmonize the conflict that now exists among the circuits.

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

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Dated: March 1, 1968.

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[11] Jurisdiction in the instant case in the court below turned upon the location of the parent office of the Employer, and not upon the location of the plant in which the organizing drive took place.

APPENDIX "E"

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 11,040

CRAWFORD MANUFACTURING CO., INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO,

Intervenor.

Upon consideration of the petition of the intervenor, Amalgamated Clothing Workers of America, AFL-CIO, for a rehearing or a rehearing en banc, the court finds no grounds asserted therein which were not presented upon the initial argument of this case and considered by the court, and finds no reason justifying the rehearing.

Wherefore, it is ordered, with the concurrence of the other members of the court, that the said petition be, and it is hereby, denied.

SIMON E. SOBELOFF
United States Circuit Judge

ALBERT V. BRYAN
United States Circuit Judge

HARRISON L. WINTER
United States Circuit Judge

Filed
Dec 6-1967

Margaret L. Davis
Chief Deputy Clerk

A true copy,
Teste:

MARGARET L. DAVIS
Chief Deputy Clerk,
U. S. Court of Appeals
for the Fourth Circuit.